83-1596

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983
NO.

FRANK J. VALENTA, Petitioner

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Respondent

and

RAYMOND J. DONOVAN, Secretary of Labor,
U.S. Department of Labor, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED

(1) Whether a successful candidate in a labor election can intervene in an action brought by the Secretary of Labor under Title IV of the election enforcement provisions of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. Section 401, 481-483, only if his intervention is to help advance the claims of the Secretary of Labor.

(2) Whether it is prejudicial to a successful candidate in a labor election to have his Motion for Intervention of Right denied in an action brought by the Secretary of Labor under Title IV of the election enforcement provision of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. Section 401, 481-483 on timeliness grounds, without first reviewing the important issue of whether the successful candidate was entitled to intervene of right.

INDEX

TABLE OF CASES Page

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Frank J. Valenta, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on December 12, 1983.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unreported and is printed in Appendix A hereto, infra, page 41. The Journal Entry of Judgment of the United States District Court for the Western District of Pennsylvania is printed in Appendix A hereto, infra, page 48.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit (Appendix A, infra, page 41) was entered on November 15, 1983. A timely petition for rehearing was denied on December 12, 1983 (Appendix A, infra, page 52). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the authority conferred on the Secretary of Labor pursuant to Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. Section 401, 481-483, which is printed in Appendix A hereto, infra, pages 54-71.

STATEMENT OF THE CASE

A lawsuit was filed by the Secretary of Labor against the United Steelworkers of America, an international union, seeking to set aside an election for the International Office of District Director of District 28, an office currently held by Frank J. Valenta. The action was filed by the Secretary pursuant to authority conferred by Title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. Section 401, 481-483. Frank Valenta, who was not

named as an individual defendant by the Secretary, filed a Motion seeking to intervene in this action for the limited and narrow purpose of asserting and protecting substantial interests, duties, and obligations as an officer of the union. The U.S. District Court for the Western District of Pennsylvania denied intervention and an appeal to the United States Court of Appeals for the Third Circuit was timely made and the Court denied the appeal and after a timely petition for rehearing the Court upheld their decision. Petitioner now prays this Honorable Court will grant his Petition for a Writ of Certiorari.

STATEMENT OF FACTS

(1) This appeal arose out of an action brought by the Department of Labor (DOL) under Title IV of the Labor-Management Reporting and Disclosure Act

of 1959 (LMRDA) against the United Steelworkers of America (hereafter USWA, International or union) in connection with the nomination and election of Director for District 28. The relevant provisions governing that action are contained in Sections 401 and Sections 481-483 of LMRDA infra. The Petitioner, Frank J. Valenta, was the incumbent Director of District 28.

(2) USWA is an International Labor Organization which is divided into twenty-four (24) geographical districts. The districts are not in themselves labor organizations, but administrative subdivisions of the International Union. One such district, District 28, covers an area in north central Ohio which has its District headquarters in Cleveland, Ohio. Each geographical area elects a District Director every four (4) years by referendum vote of the members within that

District. The last such election was held on May 28, 1981. A candidate, in order to have his name placed on the ballot for election as Director, must obtain nominations from five (5) local unions plus one additional local union for every 10,000 members (or majority fraction thereof) in the District. In connection with the most recent election of Director of District 28, which had slightly less than 50,000 members at the time, the formula translated into a requirement to receive the nominations of ten (10) locals out of the 199 local unions in the District. Every local union held a nomination meeting in March to select its nominee. The International Union Executive Board credited Albert Forney with only eight (8) such nominations.

(3) The DOL's case centers on the International Union's failure to rerun the nominations of two local unions. These locals are Local Union 1001 and Local Union 2981, both of which are located in District 28. The Secretary of Labor also raises an issue with Local Union 2732, which is not protested by Forney.

(4) Prior to the DOL's institution of the lawsuit, candidate Albert Forney, whose complaint triggered the Section 401, 481-483 investigation, filed his own lawsuit against the USWA and certain local union officers (hereafter the Cleveland lawsuit) in the United States District Court for the Northern District of Ohio. The Cleveland lawsuit alleged essentially the same arguments as the DOL's suit. In December of 1982, Judge White for the United States District Court for the Northern District of

Ohio dismissed the Cleveland case because it lacked jurisdiction. It was at this time Frank J. Valenta and his counsel determined it was imperative that he intervene in the DOL's action in order to protect his interests because it was obvious that the Union would not adequately represent those interests and he could adversely be affected by any decision of the Court.

(5) Petitioner made a timely Motion to Intervene of Right and his motion was denied on the grounds that (1) Title IV LMRDA does not permit intervention unless it is to advance the Secretary of Labor's (hereafter the Secretary) position; and (2) Petitioner's motion was not timely.

(6) Petitioner then timely appealed to the United States Court of Appeals for the Third Circuit seeking reversal of the District Court's order denying intervention. The Court affirmed the District

Court's decision, completely ignoring the important issue of whether intervention in a suit filed by the Secretary of Labor by the successful candidate in a contested election is permitted under the election enforcement provision of the LMRDA.

(7) Petitioner now seeks a Writ of Certiorari from this Honorable Court.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted because the District Court decided a federal question in a way in conflict with applicable decisions of this Court.

The District Court ruled that in order for a Movant's petition to intervene as a party defendant to be granted in an action under Title IV of the LMRDA, 29 U.S.C. Section 482(b) by the Secretary of Labor, the Movant must show that he is

intervening to advance the claims of the Plaintiff-Secretary.

Title IV, U.S.C. Section 482 states:

> (a) Filing of complaint; presumption of validity of challenged election. A member of a labor organization -
>
> (1) who has exhausted the remedies available under the constitution and by-laws of such organization and of any parent body, or
>
> (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation, may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of Section 401 (29 USCS Section 481) (including violation of the constitution and by-laws of the labor organization pertaining to the election and removal of officers). The challenged election shall

be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and by-laws may provide.

(b) Investigation of complaint; commencement of civil action by Secretary; jurisdiction; preservation of assets. The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title (29 USCS Sections 481 et seq.) has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary

> and in accordance with the provisions of this title (29 USCS Sections 481 et seq.) and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

The LMRDA Title IV does not specifically deny union members the right to intervene. In Wirtz v. Laborers' International Union, 389 U.S. 477, 482, 19 L. Ed. 2d 716, 88 S. Ct. 643 (1968), the LMRDA Title IV was interpreted by the Supreme Court to protect both the public interest and the rights of individual union members. These rights are not limited to the defeated candidate, but extend to the incumbent as well where the results of an election are challenged.

It has been the Secretary of Labor's position that 29 U.S.C. 483 which states as follows:

> No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or by-laws, except as otherwise provided by this title (29 USCS Sections 481 et seq.). Existing rights and remedies to enforce the constitution and by-laws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title (29 USCS Sections 481 et seq.). The remedy provided by this title (29 USCS Sections 481 et seq.) for challenging an election already conducted shall be exclusive.

to mean that members of the Union will be barred from intervening in the lawsuit as well as initiation of a suit by members. The Supreme Court has held that Section 483 does prohibit union members from initiating a private suit to set aside an election. Calhoun v. Harvey, 379 U.S. 134, 140, 13 L. Ed. 2d 190, 194, 85 S. Ct. 292 (1964).

However, as to the issue of intervention in the case of Trbovich v. United

Mine Workers, 404 U.S. 528, 532, 30 L. Ed. 2d 686, 92 S. Ct. 630 (1972) the Supreme Court held:

> In looking at the history shows that Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons:
>
> (1) To protect unions from frivolous litigation and unnecessary judicial interference with their elections, and
>
> (2) To centralize in a single proceeding such litigation as might be warranted with respect to a single election.

The Court went on further to say:

> That there is no evidence whatsoever that Congress was opposed to participation by union members in the litigation, so long as the participation did not interfere with the screening and centralizing functions of the Secretary (691).

The Court further went on to say that the primary objection to the provision for member suits was that it might lead to multiple litigation and multiple

forms and thereby impose on the Union the severe burden of mounting multiple defenses. It was the legislative fear that the Union would be burdened with unnecessary litigation that placed a restriction on members filing suits individually, but nothing was ever said about the intervention by union members. The Court then went on further to say Professor Archibald Cocks, who was a principal consultant to the draftsman, the Kennedy proposal made suit by the Secretary the exclusive post-election remedy in order to "centralize control of the proceedings," to adjudicate the validity of an election "once and for all in one form," and to avoid "unnecessary harassment of the Union on one side and . . . friendly suits aimed at foreclosing the Secretary's action on the other." A look at the Motion to Intervene filed by the proposed intervenor Frank Valenta did not

frustrate either of the objectives required by the legislative history and required by the Supreme Court. It is the intervenor's contention that he could lend evidence to the claims of illegality and make sure that all these claims were presented in a proper fashion. And even then the intervenor could have lent or given input to a possible suitable remedial order in the event that the Union was desirous of settling this issue. See also, Brennan v. Connecticut State UAW Community Action Program Council (CAP), 373 F. Supp. 286 (D. Conn. 1974).

But more importantly, the District Court failed to set up an evidentary hearing to determine the real purpose of the intervention and sua sponte overruled the Motion to Intervene based on representations made by the Secretary of Labor in his Brief.

What the District Court failed to do is properly interpret Trbovich at Page 694; the holding reflects as follows:

> We hold that in a post-election enforcement suit, Title IV poses no bar to intervention by a union member, so long as that intervention is limited to the claims of illegality presented by the Secretary's Complaint.

This does not mean that the evidence that Valenta may add to the case would advance the claim of the Plaintiff-Secretary. It means that claims will be presented as to the illegality of the claim. This, Petitioner intends to do. In conclusion, the District Court's denial of the Petitioner's Motion to Intervene is in conflict with applicable decisions of this Court.

II.

Certiorari should be granted because the lower courts have decided an important question of federal law which has

not been, but should be, settled by this Court.

This is the first case of this sort before this Court from the standpoint of a successful incumbent candidate seeking to intervene in an action brought by the Secretary of Labor against an International Labor Union, i.e. defendant, United Steelworkers of America, AFL-CIO, in that intervention was sought nearly thirteen months after the suit was initially filed.

Timeliness by itself is not a new issue, but when coupled with intervention by a candidate in a labor dispute, the issue takes on even more significance. Before a successful candidate can intervene in an action brought by the Secretary of Labor, he has a number of serious considerations to make. An intervenor cannot just jump into the case. Rule 24(a)(2), Federal Rules of Civil

Procedure, provides the guidelines for intervention. Rule 24(a)(2) provides inter alia, as follows:

> (a) Intervention of Right . . . (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The successful candidate must first determine if he is an eligible candidate for intervention.

The first prerequisite of Rule 24(a)(2) states that an applicant shall be permitted to intervene when he claims an interest relating to the property or transaction which is the subject of the action. See, Hobson v. Hansen, 44 FRD 18 (1968). As an Officer and Director of the Union and a member of the Union's

International Executive Committee, the Petitioner has an obligation and duty to the Union to defend it from frivolous lawsuits and unnecessary expenditures of funds. As a loyal Union member the Petitioner has a duty to defend the Constitution of the Union. Along with that duty is an obligation to discover any misfeasance or malfeasance by any other officer, director or member. Only if the Petitioner is made a party to the lawsuit can he actively seek to discover the wrongdoers, if any. A further obligation of the Petitioner is if there is any wrongdoing, then it is up to the Petitioner to find out who the wrongdoer is and bring that person up on charges for disciplinary action. Trbovich gave one reason why an incumbent should be permitted to intervene; should the Court find that there was misconduct during the election, an incumbent should be

permitted to intervene to help form a remedy. A serious question arises if the Court orders a run-off election and the incumbent loses. Will the incumbent be forced to pay back any compensation and benefits he earned during the period he held office illegally together with interest? This is a substantial interest on the part of the incumbent-intervenor. This question can only be settled if the Petitioner is permitted to intervene.

The Union does not and cannot represent the Petitioner's personal interests. It does not and cannot represent his personal interests in continuing in the office to which he was elected and which is the subject of this litigation. Nor does it or can it represent his personal interest in safeguarding his right and interest in being a candidate. Schultz v. United Steelworkers of America, 312 F. Supp. 539, (W.D. Pa. 1970). Petitioner

has met the burden of prerequisite number one.

The second prerequisite for intervention under Rule 24(a)(2) is that the applicant be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect his interest. The Petitioner's interests will not adequately be represented by the Union. This second prerequisite has been construed to mean that if the disposition of the action will cause an economic loss to absent parties already possessing a sufficient interest in the litigation, then they are in a situation of being unable to protect their interests and should be allowed to intervene. See, General Electric Company v. Bovitz Manufacturing Company, 289 F. Supp. 504 (1968). If the Petitioner is not permitted an opportunity to intervene, he will be unable to effectively

protect his interests. Petitioner has met the burden of prerequisite number two.

The third prerequisite for intervention under Rule 24(a)(2) is that the existing parties to the action are not adequately representing the Petitioner's interest. It seems rather incongruous that the Secretary will represent the interest of Petitioner. Petitioner's interests and the Secretary's position are opposite and to expect fair or adequate representation by the Secretary is impossible. That leaves the Union as the Petitioner's representative of his interests. A large labor union is a political body with the same power struggles as are seen in our own political system. If an incumbent officer is not permitted to intervene he is at the mercy of his Union, which at times can be an unsympathetic friend. The Union is not always

in favor of the candidate that is the elected choice of the membership. There remains the possibility that a Union could take advantage of a suit by the Secretary to unseed an incumbent director and gain control of a strategic district or even the entire International Union. When there are underlying motives, an incumbent's interests and rights will not be aggressively and vigorously defended by the Union, and therefore an incumbent's interests will go unvindicated.

The Union had failed to raise issues that the Petitioner would raise if he were permitted to intervene. The Petitioner contends that the Secretary has raised issues in his Complaint that were not even raised previously, and therefore, Al Forney, the other candidate, failed to exhaust his internal Union remedies. The Secretary may not sue the Union except on grounds asserted by the

complaining Union member in exhausting his Union remedies. See Wirtz v. International Union Operating Engineers, 254 F. Supp. 962. Since a Union member must exhaust his internal Union remedies before filing a Complaint with the Secretary of Labor, the Secretary may not sue to correct a violation which the member has not protested to the Union. Al Forney's complaint to the International Executive Board related to his eligibility as a candidate for Union office. His argument was that he had been nominated by ten (10) locals and therefore, he should be placed on the ballot. The International Executive Board, after having been notified by two (2) locals that Al Forney did not get their nominations and then investigating the reasons, upheld the local board's decisions and dismissed his protest. The Secretary, in his Complaint, raises issues that were

not brought before the International Executive Board. They are as follows:

(a) denying members in good standing a reasonable opportunity to nominate candidates;

(b) denying a member in good standing the right to be a candidate and hold office; and

(c) denying members in good standing the right to vote for the candidate or candidates of their choice.

(d) Forney protested the results in local unions 2981 and 1001. The Secretary of Labor raises an issue with local 2732 - not protested by Forney.

Clearly, these arguments are raised for the first time in the Secretary's Complaint and therefore, these issues were never presented to the Union by Al Forney so that the Union may rule upon such complaints and therefore, he failed to exhaust his internal Union remedies as required by 29 U.S.C. Section 482. This

is an absolute requirement before a Union member brings his complaint to the Secretary of Labor.

The Union failed to adequately represent the interests of the Petitioner and therefore, Petitioner has met the burden of prerequisite number three.

What the District Court and Court of Appeals failed to recognize is that a labor organization is a highly political entity and an elected official must tread lightly before making an important decision such as intervening in a labor action between the Secretary of Labor and his International Union. Such a decision could have disastrous ramifications. The lower courts looked at the issue of timeliness and followed the guidelines from the Third Circuit decision in Commonwealth of Pennsylvania v. Rizzo, 530 F. 2d 501 (1976), cert. den. 426 U.S. 921 (1976), which are as follows:

(1) How far the proceedings have gone when the Movant seeks to intervene. NAACP v. New York, 413 U.S. at 367-368, 93 S. Ct. 2591, 37 L. Ed. 2d 648; Iowa State University Research Foundation v. Honeywell, Inc., 459 F. 2d 447, 449 (8th Cir. 1972).

(2) Prejudice which resultant delay might cause to other parties, Diaz v. Southern Drilling Corp., 427 F. 2d 1118, 1125-1125 (5th Cir.) cert. denied, 400 U.S. 878, 91 S. Ct. 118, 27 L. Ed. 2d 115 (1970); Kozek v. Wells, 278 F. 2d 104) at 109 (8th Cir. 1960), and

(3) The reason for the delay, Iowa State University Research Foundation v. Honeywell, Inc., supra, 459 F. 2d at 449.

A trial court should only look to these guidelines after they have examined the issue of whether the Movant is entitled to intervene.

The Court in Rizzo should have had one more guideline, that is, was the Intervenor required to act in a prudent

manner before moving for intervention. If the trial court had examined Petitioner's entitlement to intervention and then examined whether his actions were prudent, the Court would have granted his Motion to Intervene. Notwithstanding the above, the Petitioner's actions were timely.

It is true that nearly thirteen (13) months passed before Frank J. Valenta moved to intervene. There are good reasons for his delay. First, the United Steelworkers of America was made a co-defendant to a lawsuit in Cleveland by Al Forney, the complainant in the Secretary's action. In this lawsuit, issues pertinent to the Pittsburgh case were raised and fully argued. Judge White, towards the end of the trial, suggested that his Court may not have jurisdiction in that matter and that is when it was decided intervention in the Pittsburgh

case was imperative. On December 3, 1982 the Cleveland Court held that it indeed lacked jurisdiction and that exclusive jurisdiction layed in the Pittsburgh District Court.

Secondly, it was also necessary for Frank J. Valenta to sit back and see if the Union would adequately represent his interests in the case. After viewing the arguments raised by the Union, it was necessary for Frank J. Valenta to become involved in the above case. Clearly, issues discussed at trial were not raised by the Union's counsel.

The issues the Petitioner intends to raise are to protect his interests. These interests would not have been different had they been raised thirteen months earlier. What was necessary was for Petitioner to view the acts of the Union to see if they would adequately represent his interests. They did not.

Therefore, it was imperative that he take action to become a party to the suit.

Counsel for Petitioner in his Motion to Intervene made it clear that no extensions of time would be required to facilitate discovery if he were permitted to intervene. In fact, if Petitioner were permitted to intervene and the trial date set for tomorrow, he would be prepared to go forward immediately.

In Trbovich at 536 the Supreme Court found:

> "Intervention by Union members in a pending enforcement suit, unlike initiation of a separate suit, subjects the Union to relatively little additional burden. The principal intrusion or internal Union affairs has already been summoned into Court to defend the legality of its election. Intervention in the suit by Union members will not subject the Union to burdensome multiple litigation, nor will it compel the Union to respond to a new and potentially groundless suit."

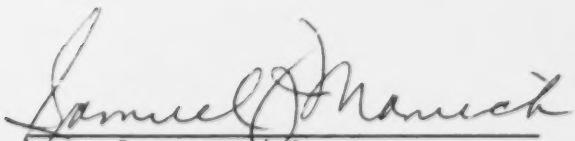
It is clear that the Trbovich Court found that intervention would add a

minimal burden to the Union. If this burden is at best minimal at the beginning of the lawsuit then it should not increase as the suit proceeds and the Union becomes prepared to go to trial. Since the Union will suffer no greater burden now than it did at the beginning there can be no issue of lack of timeliness.

Therefore, Petitioner's Motion to Intervene was timely and should have been granted by the District Court.

CONCLUSION

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted.



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CERTIFICATE OF SERVICE

A true copy of the foregoing Petition for a Writ of Certiorari was sent by Regular U.S. Mail on this 16th day of February, 1984 to the following parties:

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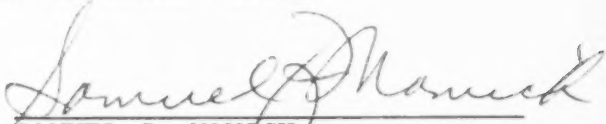

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-5178

RAYMOND J. DONOVAN,
Secretary of Labor,
U.S. Department of Labor

vs.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO

FRANK J. VALENTA
Appellant

Appeal from the United States District Court
for the Western District
of Pennsylvania (Pittsburgh)

(D.C. Civil No. 81-1726)

Argued
November 4, 1983

Before: ALDISERT, HUNTER, and WEIS,
Circuit Judges.

(Filed November 15, 1983)

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ALDISERT, Circuit Judge.

This appeal is from the denial of incumbent union officer Frank J. Valenta's motion to intervene in an action by the Secretary of Labor under Title IV of the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. Section 482(b), seeking to set aside the election for the office of district director.[1] A number of questions

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1. 29 U.S.C. Section 482(b) provides:

> The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

relating to intervention are presented, but in the view we take, it will be necessary to review only the district court's determination that Valenta's motion to intervene was not timely.[2] For the purposes of our analysis we assume, without deciding, that intervention by the successful candiate in a contested election is permitted under the election enforcement provision of the LMRDA and that the requirements of Rule 24(a)(2), F.R.Civ.P., other than timeliness, were met.[3]

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2. Other questions presented include whether an officer who had been successful in the election is permitted to intervene on the side of the defendant union under 29 U.S.C. Section 482 and whether such officer has a right to intervene under the terms of Rule 24(a)(2), F.R.Civ.P.

3. Rule 24(a)(2), R.F.Civ.P. provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the

Central to intervention in any proceeding is that the motion to intervene be timely. In the exercise of its sound discretion, the district court determines timeliness after consideration of all the circumstances. We will reverse only for an abuse of discretion. Commonwealth of Pennsylvania v. Rizzo, 530 F.2d 501, 506 (3rd Cir.) cert. denied, 426 U.S. 921 (1976).

This court set forth several factors in Rizzo to inform the district court's discretion in determining whether a motion to intervene is timely. Id. They include: (1) the stage of the proceedings when the movant seeks to intervene; (2) possible prejudice caused to other parties by delay; and (3) the reason for

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disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

delay. Id. (quoting Nevilles v. EEOC, 511 F.2d 303, 305 (8th Cir. 1975)).

In the case at bar, the district court considered the factors and found against appellant on each of them. First, appellant did not seek to intervene until more than thirteen months after the complaint had been filed. All of the pre-trial work was complete at that time and the case was already scheduled for trial. Second, the court found that substantial prejudice could result to the other parties. We agree. The longer the proceedings are delayed, the longer the challenging candidate remains out of office and the longer the intervenor retains the office. Allowing intervention at this point would contravene Congress's interest in resolving challenges to union elections as quickly as possible. See Dunlop v. Bachowski, 421 U.S. 560, 569 (1975). Third, the

district court found that appellant offered no meaningful justification for his delay. Again, we agree. The excuses offered by appellant are not persuasive. He argues that he was awaiting the outcome of a second suit pending in federal court in the Northern District of Ohio, hoping it would be res judicata to the present one. That suit was dismissed for lack of jurisdiction. Appellant further argues that he delayed intervention until he could determine whether his interests were adequately represented. These arguments resemble evidence of tactical decisions; collectively and individually, they do not excuse the delay for intervention in the case here.

The judgment of the district court denying intervention will be affirmed.

A True Copy:
Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,	)	
Plaintiff	)	
v.	)	Civil Action No. 81-1726
UNITED STEELWORKERS OF AMERICA, AFL-CIO,	)	
Defendant.	)	

MEMORANDUM OF ORDER

AND NOW, this 20th day of December, 1982, a motion to intervene having been filed in the above-captioned case on behalf of Frank J. Valenta together with a brief in support thereof, and, the plaintiff having filed a reply brief in opposition to the motion, and the court having given the matter due consideration, IT IS ORDERED that the motion to

intervene be and the same hereby is denied for the following reasons:

1.) The court finds that the movant's petition to intervene as a party defendant is barred under Title IV of the Labor Management Reporting and Disclosure Act, 29 U.S.C. Section 482(b), for the reason that the movant does not seek to intervene to advance the claims of the plaintiff-secretary. Trbovich v. United Mine Workers, 404 U.S. 528, 537 (1972); Brennan v. United Steelworkers of America, 554 F.2d 586, 594 (3rd Cir. 1977); Brennan v. Silvergate Dist. Lodge No. 50 et al., 503 F.2d 800, 805 (9th Cir. 1974); Cf. Hodgson v. Carpenters Resilient Flooring Lodge Union

No. 2212, 457 F.2d 1364 (3d Cir. 1972).

2.) In addition, the court finds that the movant's petition is untimely under the standards enunciated in Commonwealth of Pa. v. Rizzo, 530 F.2d 501, 506 (3rd Cir. 1976) in that: (a) the motion has been thirteen months after this suit was initiated and after the case was listed for trial; (b) the intervention at this stage of the proceedings by the movant will result in prejudice to both the plaintiff and defendant as the movant's interests are potentially adverse to each party; and (c) the movant

offers no justification for the delay in presenting his motion.

/s/ Gustave Diamond
United States District Judge

cc: All counsel of record.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5178

RAYMOND J. DONOVAN,
Secretary of Labor,
U.S. Department of Labor

vs.

UNITED STEELWORKERS OF AMERICA, AFL-CIO

FRANK J. VALENTA, Appellant

(W.D. Pa. Civ. No. 81-1726)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Aldisert
Circuit Judge

DATED: DEC 12 1983

Section 401. Congressional declaration of findings, purposes, and policy

(a) The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) The Congress, therefore, further finds and declares that the enactment of this Act is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants,

and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce. (Sept. 14, 1959, P.L. 86-257, Section 2, 73 Stat. 519.)

Section 481. Terms of office and election procedures

(a) Officers of national or international labor organizations; manner of election. Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

(b) Officers of local labor organizations; manner of election. Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

(c) Requests for distribution of campaign literature; civil action for

enforcement; jurisdiction; inspection of membership lists; adequate safeguards to insure fair election. Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its oficers, shall be under a duty, enforceable at the suit of any bona fide candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of

members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained and kept at the principal office

of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

(d) Officers of intermediate bodies; manner of election. Officers of intermediate bodies, such as general committees, system boards, joint boards, or joint councils, shall be elected not less often than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot.

(e) Nomination of candidates; eligibility; notice of election; voting rights; counting and publication of results; preservation of ballots and records. In any election required by this section which is to be held by secret

ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 [29 USCS Section 504] and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be

declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title [29 USCS Sections 481 et seq.].

(f) Election of officers by convention of delegates; manner of conducting convention; preservation of records. When officers are chosen by a convention of delegates elected by secret ballot,

the convention shall be conducted in accordance with the constitution and bylaws of the labor organization insofar as they are not inconsistent with the provisions of this title [29 USCS Sections 481 et seq.]. The officials designated in the constitution and bylaws or the secretary, if no other is designated, shall preserve for one year the credentials of the delegates and all minutes and other records of the convention pertaining to the election of officers.

(g) Use of dues, assessments or similar levies, and funds of employer for promotion of candidacy of person. No moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this title [29 USCS Sections 481 et seq.]. Such

moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election.

(h) Removal of officers guilty of serious misconduct. If the Secretary, upon application of any member of a local labor organization, finds after hearing in accordance with the Administrative Procedure Act that the constitution and bylaws of such labor organization do not provide an adequate procedure for the removal of an elected officer guilty of serious misconduct, such officer may be removed, for cause shown and after notice and hearing, by the members in good standing voting in a secret ballot conducted by the officers of such labor organization in accordance with its constitution and bylaws insofar as they are not inconsistent with the provisions

of this title [29 USCS Sections 481 et seq.]

(i) Rules and regulations for determining adequacy of removal procedures. The Secretary shall promulgate rules and regulations prescribing minimum standards and procedures for determining the adequacy of the removal procedures to which reference is made in subsection (h). (Sept. 14, 1959, P.L. 86-257, Title IV, Section 401, 73 Stat. 532.)

Section 482. Enforcement

(a) Filing of complaint; presumption of validity of challenged election. A member of a labor organization --

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 [29 USCS Section 481] (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter

provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) Investigation of complaint; commencement of civil action by Secretary; jurisdiction; preservation of assets. The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title [29 USCS Sections 481 et seq.] has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of

officers under the supervision of the Secretary and in accordance with the provisions of this title [29 USCS Sections 481 et seq.] and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(c) Declaration of void election; order for new election; certification of result of vote for removal of officers. If, upon a preponderance of the evidence after a trial upon the merits, the court finds --

(1) that an election has not been held within the time prescribed by section 401 [29 USCS Section 481], or

(2) that the violation of section 401 [29 USCS Section 481] may

have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 401 [29 USCS Section 481(h)], the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

(d) Review of orders; stay of order directing election. An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal. (Sept. 14, 1959, P.L. 86-257, Title IV, Section 402, 73 Stat. 534.)

Section 483. Application of other laws; existing rights and remedies; exclusiveness of remedy for challenging election

No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title [29 USCS Sections 481 et seq.]. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title [29 USCS Sections 481 et seq.]. The remedy provided by this title [29 USCS Sections 481 et seq.] for challenging an election already conducted shall be exclusive. (Sept. 14, 1959, P.L. 86-257, Title IV, Section 403, 73 Stat. 534.)

No. 83-1596

In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANK J. VALENTA, PETITIONER

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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TABLE OF AUTHORITIES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioner, an incumbent officer and successful candidate in a labor union election, contends that the district court abused its discretion in denying him leave to intervene in an action brought by the Secretary of Labor to set aside the election under Title IV of the Labor-Management Reporting and Disclosure Act of 1959.

1. a. On May 28, 1981, the United Steelworkers of America, AFL-CIO (the union) held an election for the office of Director of District 28. Petitioner, the incumbent Director, was able to run for office unopposed because the union failed to give his opponent credit for nominations received from two of the ten locals necessary for nomination under the union's rules (Pet. 11-12).

The unsuccessful candidate complained of his disqualification to the Secretary of Labor, in accordance with procedures set forth in Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 481 *et seq.* The Secretary investigated the complaint and found probable cause to believe that violations of Section 401(e) of the Act (29 U.S.C. 481(e)) had occurred during the challenged election.

b. On October 2, 1981, the Secretary brought this action in the United States District Court for the Western District of Pennsylvania under Section 402 of the Act (29 U.S.C. 482). The Secretary sought an order voiding the May 28, 1981 election and directing the union to conduct a new election under supervision of the Secretary.

On July 26, 1982 the district court closed discovery; it then placed the case on its trial list. On November 18, 1982, more than 13 months after the Secretary's complaint was filed, petitioner moved to intervene as a party defendant. On December 20, 1982 the district court denied the motion (Pet. App. 48-51).

The district court first found that "the movant's petition to intervene as a party defendant is barred under Title IV of [the LMRDA] for the reason that the movant does not seek to intervene to advance the claims of the plaintiff-secretary" (Pet. App. 49). In any event, the court held, the motion was "untimely under the standards enunciated in *Commonwealth of Pa.* v. *Rizzo*, 530 F.2d 501, 506 (3rd Cir. 1976)" (Pet. App. 50).

c. The court of appeals affirmed (Pet. App. 41-47; 721 F.2d 126). It noted that it would reverse a decision that intervention was not timely only where there was an abuse of discretion (Pet. App. 45). The court then held that in this case there had been no such abuse (*id.* at 46-47):

> First, appellant did not seek to intervene until more than thirteen months after the complaint had been filed. All of the pretrial work was complete at that time and the case was already scheduled for trial. Second, the court found that substantial prejudice could result to the other parties. We agree. The longer the proceedings are delayed, the longer the challenging candidate remains out of office and the longer the intervenor retains the office. Allowing intervention at this point would contravene Congress's interest in resolving challenges to union elections as quickly as possible. See *Dunlop* v. *Bachowski*, 421 U.S. 560, 569 (1975). Third, the district court found that appellant offered no meaningful justification for his delay. Again, we agree.[1]

Because the court of appeals viewed the issue of untimeliness as dispositive, it found it unnecessary to address such questions as "whether an officer who had been successful in the election is permitted to intervene on the side of the defendant union under 29 U.S.C. Section 482 and whether such officer has a right to intervene under the terms of Rule 24(a)(2), F.R.Civ.P." (Pet. App. 44 n.2).

2. The decision of the court of appeals is correct and consistent with the purposes of the Federal Rules of Civil Procedure and the LMRDA. It does not conflict with the decisions of this Court or of any other court of appeals. Indeed, it involves nothing more than the application of well-settled principles to the facts of this case. Further review is unwarranted.

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[1]Petitioner argued that his delay was justified because he had been awaiting the outcome of a related suit, later dismissed for lack of jurisdiction, and because he had needed time to determine whether his interests were being adequately represented by the union. The court of appeals concluded that "[t]hese arguments resemble evidence of tactical decisions; collectively and individually, they do not excuse the delay for intervention in the case here" (Pet. App. 47).

Fed. R. Civ. P. 24(a) makes it a prerequisite to intervention that the application be "timely."[2] In *NAACP* v. *New York*, 413 U.S. 345, 365-366 (1973) (footnote omitted), this Court noted that:

> [A]lthough the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

The "circumstances" to which the Court referred include, in addition to the stage the proceedings have reached,[3] such factors as the prejudice that delay might cause to other parties,[4] and the justification for the delay.[5] See generally *Commonwealth of Pennsylvania* v. *Rizzo*, 530 F.2d 501, 506 (3d Cir.), cert. denied, 426 U.S. 921 (1976); *Nevilles* v. *EEOC*, 511 F.2d 303, 305 (8th Cir. 1975).

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[2]Rule 24(a) states:

> *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[3]See also *Iowa State University Research Foundation* v. *Honeywell, Inc.*, 459 F.2d 447, 449 (8th Cir. 1972).

[4]See, *e.g.*, *Diaz* v. *Southern Drilling Corp.*, 427 F.2d 1118, 1125 (5th Cir.), cert. denied, 400 U.S. 878 (1970); *Kozak* v. *Wells*, 278 F.2d 104, 109 (8th Cir. 1960).

[5]See, *e.g.*, *Iowa State University Research Foundation* v. *Honeywell, Inc.*, 459 F.2d at 449.

Applying these criteria, the district court found that petitioner's motion came 13 months after suit was filed, would (if granted) be prejudicial to the existing parties, and offered "no justification" for the inordinate delay (Pet. App. 50-51). The court of appeals agreed in all respects.

Petitioner nevertheless argues that his delay was "prudent" (Pet. 33) because his opponent in the election had also sued the union in another action (whose outcome he was awaiting) (Pet. 34), and because "it was also necessary for [him] to sit back and see if the Union would adequately represent his interests" (Pet. 35). These contentions are without merit. The latter claim is one that could be made by any untimely intervenor. Petitioner says nothing that makes his case appear to be unique, other than the suggestion (Pet. 29) that he might have raised several issues the union did not.[6] Petitioner also claims that he was awaiting the outcome of a related lawsuit. But he does not indicate that he was a party to that action,[7] and the suit was in any event not dismissed until *after* petitioner moved to intervene here (Pet. 35).[8]

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[6]We note that the issues petitioner asserts a desire to litigate concern his opponent's failure to exhaust internal union remedies (Pet. 29-31) —a matter that is far more pertinent to the union's interest in self-government than to petitioner's personal stake in his office. See *Labor-Management Reform Legislation: Hearings on S. 505 et al. Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 86th Cong., 1st Sess. 134 (1959) (testimony of Archibald Cox).

[7]His interests were instead represented by the same union whose representation in this action he claims was inadequate. See Pet. 34.

[8]Because the court of appeals found that petitioner's motion to intervene was untimely, it did not reach the question whether the LMRDA bars intervention by a successful candidate as a party defendant on the side of the union. Consideration of that question by this Court would thus be inappropriate, see *Smith* v. *Butler*, 366 U.S. 161 (1961), and would in any event not change the outcome of the case. We note, however, that the district court's ruling is consistent with *Trbovich*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FRANCIS X. LILLY
Solicitor

MAY 1984

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v. *United Mine Workers*, 404 U.S. 528, 536-537 (1972), and with the only case since *Trbovich* to decide the same issue. *Brennan* v. *Silvergate District Lodge No. 50*, 503 F.2d 800, 806 (9th Cir. 1974).

DOJ-1984-05